IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
May 10, 2006 Session

STATE OF TENNESSEE V. EDITH MAE GILLMAN

Appeal from the Criminal Court for Davidson County
No. 2003-D-2934 Steve Dozier, Judge

No. M2005-01863-CCA-R3-CD - Filed October 18, 2006

The appellant, Edith Mae Gillman, a.k.a. Edith Joyce Gillman, a.k.a. Joyce Collins, pled guilty to one count of rape. Under the terms of her plea bargain, the appellant accepted an eight-year suspended sentence with twelve years of probation. As a condition to this probation, she agreed to undergo psycho-sexual evaluation and sex-offender treatment, pursuant to Tennessee Code Annotated section 39-13-706. The appellant's probation officer took out a probation violation warrant on the grounds that the appellant had failed to comply with court-ordered sex-offender treatment. The trial court revoked the appellant's probation and ordered her entire eight year sentence into effect. The appellant appeals the trial court's decision to revoke her probation and the trial court's order placing her entire suspended sentence into effect. Because the appellant was not on notice that admitting her guilt was a condition of compliance with the treatment program, and therefore of her probation, we reverse the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court is Dismissed.

JERRY L. SMITH, J., delivered the opinion of the court, in which ALAN E. GLENN, J., joined and GARY R. WADE, P.J. not participating.

Emma Rae Tennent, Assistant Public Defender, on trial and Amy Harwell, Assistant Public Defender, at hearing, for the appellant, Edith Gillman.

Paul G. Summers, Attorney General and Reporter; Brent C. Cherry, Assistant Attorney General; Victor S. Johnson, District Attorney General; and Jason Ponder, Assistant District Attorney General, for the appellee, State of Tennessee.

Factual Background

On November 23, 2004, the appellant pled guilty to a rape committed in May of 2003. At the time of the incident, the appellant was fifty-eight years old. At the hearing, the prosecutor stated that, had the case proceeded to trial, the state would have presented the following evidence. The appellant's victim was a nine year old girl who was spending the night at her residence. During the night, the appellant pulled down the girl's pants and underwear. She then inserted her finger into the girl's anus. The next morning, the girl told her mother about the assault. Her mother discovered a foreign, jelly-like substance around the girl's rectum. Investigators found a tube of personal lubricant in the bedroom where the victim was assaulted.

When police questioned the appellant about the incident, she initially denied any contact with the victim. In a pattern that would be repeated, the appellant changed her story, and admitted to the offense. Subsequently, however, she suggested that she may have committed the act while under the influence of medication. Upon entering her guilty plea, the appellant verified the factual basis for the plea as it was read into the record by the prosecutor.

On December 8, 2003, the appellant was indicted for rape of a child, in violation of Tennessee Code Annotated section 39-13-522, and rape, in violation of Tennessee Code Annotated section 39-13-503. On November 23, 2004, the appellant pled guilty to rape, which was Count Two of the indictment, and accepted an eight-year suspended sentence with twelve years of probation. Pursuant to the terms of her plea bargain, the appellant was required to have no contact with children under the age of eighteen and to submit to psycho-sexual evaluation and sex-offender treatment, as required by the Tennessee Standardized Treatment Program for Sex Offenders (TSTPSO). See Tenn. Code Ann. § 39-13-701 et. seq. At her probation violation hearing, the appellant's defense counsel told the trial court that this was not a best interest plea.

On December 2, 2004, the appellant attended her first meeting with George J. Harien, her probation officer. At this meeting, Harien and the appellant discussed the rules of her probation, as well as the sex-offender directives, which the appellant signed. One of these directives was the requirement that the appellant comply with the sex-offender treatment program. Harien said that he informed the appellant "that treatment was about honesty, being forthright about your offense." At this meeting, however, the appellant told Harien that she did not commit the crime to which she pled guilty. Accordingly, Harien referred the appellant for a polygraph examination. He also referred her to the sex-offender treatment program at Centerstone. At her polygraph examination, the appellant initially "denied ever touching the victim," but later changed her statements to admit that "she had probably inserted her finger into the victim's rectum for some type of sexual reason," but that she "didn't understand why she would have done it."

As part of her probation, the appellant met with Harien twice a month. To Harien's best recollection, the appellant did not miss any of their scheduled meetings. At

the first group reporting session, on January 12, 2005, Harien asked the appellant to recount the offense for which she was charged. The appellant wrote a short statement in which she claimed that she inserted her finger into the victim's anus because she was "trying to help with bowle [sic] movement." Harien testified that this was not the first time she used this particular excuse. During later meetings, Harien claims that the appellant would deny violating the victim, often blaming an unnamed third party for the crime.

On February 9, 2005, the appellant had an intake and evaluation meeting with Amy Haigee, a staff member of the sex-offender treatment program at Centerstone. At this meeting, the appellant again refused to admit to the offense. After the director of the Centerstone program, Dr. Donna Moore, met with Haigee and other staff members, the appellant was provisionally admitted into the program, but they concluded that "she needed to accept responsibility for her sexual motivation and work or she would be expelled from treatment." At the appellant's probation violation hearing, Dr. Moore testified that eligibility for the program "is determined based upon criteria for treatment." The central criterion is admission of sexual intent in the commission of the crime; the patient must "accept[] responsibility for behavior" and express "motivation for treatment."

On February 23, 2005, the appellant signed a treatment contract and was given her first assignment—composition of a sexual autobiography. On February 28, 2005, the appellant arrived at her first treatment session without having completed the assignment. She was told at that time that failure to complete the assignment would result in her expulsion from treatment sessions. When she arrived at her March 9, 2005 session, again with an incomplete sexual autobiography, the appellant was expelled from the session. She was, however, allowed to remain at her third and fourth sessions, on March 16 and 23, to work on the still incomplete assignment.

At some point, the appellant completed a sixteen-page, handwritten sexual autobiography. Dr. Moore testified that she had not read the entire document, suggesting that it was not a "quality" account of the appellant's sexual history. The record contains no elaboration as to specific reasons why Dr. Moore believed that the document failed to meet Centerstone's standards of acceptability, nor as to how it failed to further the appellant's treatment. In the document, the appellant recounts having been repeatedly raped by one of her father's friends. She also tells of becoming pregnant with the rapist's child at the age of twelve. She writes that her father forced her to marry her assailant. The autobiography also speaks of physical abuse by this first husband, as well as at least one other incident of sexual battery—an additional rape committed by an unknown assailant. She also discusses her sexual relationship with her current husband.

Dr. Moore testified that, during the March 23, 2005 session, the appellant "continued to blame other people." At her March 39 session, she denied having "intentionally offended her victim." However, at another meeting with Haigee, after the March 30 session, the appellant again admitted that she "did it," but refused to go into any further detail. During her periodic fits of denial, the appellant was informed by

Centerstone staff that if the incident was accidental, or if it did not occur at all, then she "couldn't be treated for a problem that she didn't have." On April 6, 2005, Centerstone contacted Harien to inform him that the appellant was not complying with treatment. A meeting between the appellant, Harien, and the Centerstone staff was scheduled for April 21, 2005.

In the interim, on April 13, 2005, the appellant attended another group reporting session with Harien. At this meeting, she composed a new written statement. In her most detailed description of the offense, the appellant wrote: "When [the victim] stayed with me one night I placed my finger up her butt with V. jelly while I master bated [sic] to see what it would feel like." In the statement, she mentioned having been raped herself, as a child. At the April 21, 2005 meeting with Harien and the Centerstone staff, the appellant was confronted with this admission. Dr. Moore testified that the appellant told the attendees "that she only made that statement because she thought it was a good deal, her attorney had told her that she needed to, for a plea bargain, admit that." On the bottom of the April 13 statement, the appellant wrote "False Statement" and signed her name.

On May 5, 2005, Harien took out a probation violation warrant on the grounds that the appellant failed to comply with court-ordered sex offender treatment, a violation of Rules #1, #6, and #10 of her probation.[1] On June 23, 2005, the trial court heard arguments on the matter, as well as testimony by Harien and Dr. Moore. Ruling in favor of the State, the trial court ordered the appellant's eight-year sentence into effect on June 28. The trial court found that the appellant displayed "a conscious and willful failure to comply with the sex offender treatment on multiple occasions," pointing specifically to her practice of "giving statements to the treatment providers in which she blames her culpability upon unknown perpetrators and on occasion admitting her offense yet retracting shortly thereafter."

Analysis

The appellant contends that the trial court erred in revoking her probation. She claims that Centerstone's policy requiring admission of guilt is a subjective criterion of compliance, an arbitrary standard of treatment specific to the Centerstone program. Because the appellant was attending and participating in meetings with her probation officer and Centerstone staff, she argues that she fulfilled the objective requirements of the treatment program, pursuant to our decision in State v. William A. Marshall, No.

[1] As stated in the Probation Order:

"1. I will obey the laws of the United States, or any State in which I may be, as well as any municipal ordinances.

. . . .

6. I will allow my Probation Officer to visit my home, employment site, or elsewhere, will carry out all lawful instructions he or she gives; will report to my Probation Officer as instructed . . . .

. . . .

10. I will observe any special conditions imposed by the Court as listed below: Sex offender treatment program; psycho-sexual evaluation[;] waive probation fees; No contact with children under age 18[.]"

M2001-02954-CCA-R3-CD, 2002 WL 31370461 (Tenn. Crim. App. at Nashville, Oct. 14, 2002). The State contends that the appellant clearly violated the terms of her probation, and that the trial court erred neither in revoking her probation, nor in ordering her entire eight-year sentence into effect.

A trial court may revoke probation and order the imposition of the original sentence upon a finding by a preponderance of the evidence that the person has violated a condition of probation. Tenn. Code Ann. §§ 40-35-310, 40-35-311. After finding a violation of probation and determining that probation should be revoked, a trial judge can: (1) order the defendant to serve the sentence; (2) cause execution of the judgment as it was originally entered, or, in other words, begin the probationary sentence anew; or (3) extend the probationary period for up to two years. See Tenn. Code Ann. §§ 40-35-308(c), 40-35-311(e); State v. Hunter, 1 S.W.3d 643, 647-48 (Tenn. 1999). The decision to revoke probation rests within the sound discretion of the trial court. State v. Mitchell, 810 S.W.2d 733, 735 (Tenn. Crim. App. 1991). Revocation of probation and a community corrections sentence is subject to an abuse of discretion standard of review, rather than a de novo standard. State v. Harkins, 811 S.W.2d 79, 82 (Tenn. 1991). An abuse of discretion is shown if the record is devoid of substantial evidence to support the conclusion that a violation of probation has occurred. Id. The evidence at the revocation hearing need only show that the trial court exercised a conscientious and intelligent judgment in making its decision. State v. Leach, 914 S.W.2d 104, 106 (Tenn. Crim. App. 1995).

As a general matter, however, due process requires that probationers only be held responsible for violations of those conditions of probation of which they were reasonably apprised. See Stacy Stewart v. State, No. M1999-00684-CCA-MR3-CD, 2000 WL 374756 (Tenn. Crim. App. at Nashville, April 7, 2000). A defendant who is granted probation has a liberty interest that is protected by due process of law. Practy v. State, 525 S.W.2d 677, 680 (Tenn. Crim. App. 1974). Additionally, "it is fundamental to our system of justice through due process that persons who are to suffer penal sanctions must have reasonable notice of the conduct that is prohibited." State v. Stubblefield, 953 S.W.2d 223, 225 (Tenn. Crim. App. 1997) (citing United States v. Harriss, 347 U.S. 612 (1954); State v. Ash, 729 S.W.2d 275, 279 (Tenn. Crim. App. 1986)). A defendant is presumed to be on notice that, as a condition of probation, she is required to conform her conduct to the requirements of the criminal laws of this state. Stubblefield, 953 S.W.2d at 225; Stacy Stewart, 2000 WL 372756, at *2.

While this Court generally assumes a highly deferential posture when addressing a trial court's decision to revoke probation, this is no blanket assurance that the revocation will stand on appeal. The appellant relies on this Court's decision in State v. William A. Marshall, 2002 WL 31370461, at *1, in which we reversed a trial court's judgment that the defendant had failed to comply with mandatory sex-offender treatment. Specifically, she argues that the decision to revoke her probation was erroneously based on Centerstone's subjective standard of compliance—requiring that she admit her guilt. Rather, she contends that she was in compliance with the treatment program, as measured

by the objective indicia of compliance that we determined were legally significant in William A. Marshall—attendance and participation.

The defendant in William A Marshall was referred to a "task based" treatment program with no defined point of completion. 2002 WL 31370461, at *2. Upon the close of his two-year suspended sentence, the program's administrators concluded that he had not completed the program. Accordingly, the defendant's probation was extended for two additional years, pursuant to Tennessee Code Annotated section 40-35-308(c). Id. at *1. At the end of the extension period, the defendant's treatment providers again concluded that he had not completed the program, though they admitted at the appellant's probation violation hearing that "no one really knew how long the program would run. Nevertheless, [a therapist] opined that it was possible to complete the program in four years." Id. at *2.

The defendant in William A. Marshall "had paid all of his fees, fines, and costs" and he "had regularly attended sessions . . . on a weekly basis." Id. at *1. There was also evidence that he was completing the required tasks. Accordingly, this Court concluded that the defendant had indeed completed the treatment program and reversed the revocation of probation, based upon the stated legislative intent behind the TSTPSO. Specifically, the Court noted that the statute plainly provides that "in creating the program described in [the TSTPSO], the general assembly does not intend to imply that all sex offenders can be successful in treatment." Id. at *8 (quoting Tenn. Code Ann. § 39-13-702(b)). Accordingly, this Court held that the defendant "completed the treatment program by fulfilling all of the objective standards and by cooperatively participating during a substantial portion of the treatment period." Id.

However, in a case factually similar to the appeal before this Court, State v. Joe Shelton Berry, No. M2004-03052-CCA-R3-CD, slip op., 2005 WL 2438390 (Tenn. Crim. App. at Nashville, Sept. 27, 2005), we affirmed a trial court's revocation of probation for a defendant that was discharged from sex-offender treatment for refusal to admit guilt for the offense to which he had pled no contest. The defendant had already had his probation revoked once, only to have it reinstated by the trial court upon further conditions that he avoid contact with children and resume the treatment program. Id. at *1. His therapists admitted that he had attended all of the required meetings, but concluded that his tendency of "almost [telling] the truth but then refus[ing] to" was hindering his progress. Id. We affirmed the revocation, concluding that the trial court had exercised conscientious judgment. Id. at *3. Distinguishing Joe Shelton Berry from the Court's earlier decision in William A. Marshall, we determined that "[a]lthough the defendant was punctual and attended every session, he did not have otherwise positive participation as did the defendant in [William A.] Marshall. The defendant did not fulfill

the objective standards of his treatment program by his lack of candor, lackadaisical attitude, and inadequate participation." Id.[2]

We note first that this appeal can be distinguished on the facts from our decision in Joe Shelton Berry. First, the defendant in Joe Shelton Berry had been given a second chance to comply with the terms of his treatment program. After having his probation revoked for noncompliance, it was reinstated with the condition that he re-enter the treatment program. There is no indication in the Court's opinion that his initial revocation was based (either wholly or even in part) upon refusal to admit guilt. Nevertheless, because he had previously begun the treatment program, when the defendant accepted the trial court's order that he resume treatment as a condition of reinstated probation, it might fairly be stated that he had sufficient notice that his treatment providers would request admissions of guilt. Second, the decision in Joe Shelton Berry cited, in addition to the defendant's "lack of candor," evidence of a "lackadaisical attitude, and inadequate participation," as well as a generally "casual disregard toward his treatment." 2005 WL 2439390, at *3. There is no indication that the appellant in this case displayed such an attitude. In fact, she completed a sixteen-page handwritten sexual autobiography, divulging experiences of sexual and physical assault that one cannot doubt were difficult to recall. Likewise, her attendance record was satisfactory, and the only alleged problem with participation was her vacillation between admission and denial.

Therefore, it appears that successful completion of a sexual offender program wherein guilt must be admitted may be a condition of probation. In our view, the central issue in this case is whether the appellant was sufficiently on notice that, as a condition of her probation, she would have to admit her offense while enrolled in the sex-offender treatment program.

Although Tennessee courts have not yet addressed the specific issue presented in the case herein, notice of an admission-of-guilt condition of sex-offender treatment has been addressed by courts in other states. The State points to a case in which the Colorado Supreme Court held that an appellant who pled guilty to sexual assault, and did not subsequently seek to withdraw that plea, violated the conditions of his probation by subsequently refusing to admit commission of the crime to evaluating therapists. People v. Ickler, 877 P.2d 863 (Colo. 1994); see also Conn. Gen. Stat. Ann. § 53a-32a (providing that defendants who plead nolo contendere or enter an Alford plea violate the terms of court-ordered sex-offender treatment when they refuse to acknowledge commission of

[2] In State v. Mounger, 7 S.W.3d 70 (Tenn. Crim. App. 1999), we remanded a trial court decision to revoke a defendant's probation on the grounds that he failed to cooperate with sex-offender treatment. The defendant had resisted "fully disclosing . . . his sexually offensive history [to an evaluating therapist] at the advice of his attorney" because the therapist would have been required to report knowledge or suspicion of other instances of sexual abuse of a child (besides that for which he pled guilty) to the appropriate authorities. Id. at 72, 77; Tenn. Code Ann. § 37-1-605(a). Our decision in Mounger was largely based upon the issue of potential self-incrimination, which the appellant in this case has not raised. Therefore, we decline to decide whether an admission-of-guilt criterion for statute-ordered sex-offender treatment violates the right against self-incrimination.

the offense). However, other states have held that where the trial court failed to include specific probation instructions requiring admissions of guilt, reticence does not constitute a violation of probation. Morstad v. State, 518 N.W.2d 191 (N.D. 1994); Diaz v. State, 629 So. 2d 161 (Fla. Dist. Ct. App. 1993).

We find the latter approach to be most consistent with this Court's rule that defendants may only suffer revocation of probation for violations of those conditions of which they had notice.[3] Turning to the case sub judice, a review of the record establishes that the appellant was not on notice that, as a condition of her probation, she would have to admit guilt to a treatment provider. At her guilty plea hearing, the trial judge issued rather ambiguous instructions:

> THE COURT: . . . That you receive this evaluation and be part of, participating in the sex offender treatment program. Is that your understanding?
>
> MS. GILLMAN: Yes, sir.
>
> . . . .
>
> THE COURT: The Court finds a factual basis for the plea, that it is knowingly and voluntarily entered. Will impose an eight year sentence as a range one offender, suspend that. Place you on 12 years probation with the conditions that you have no contact with children under the age of 18. Receive this psycho-sexual evaluation and sex offender treatment. Do you have any questions?
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> MS. GILLMAN: No, sir.

Neither the Petition to Enter Plea of Guilty, nor the judgment form, nor the Probation Order states that the appellant was required to admit guilt to a treatment provider. Accordingly, because the appellant was not on notice that admitting guilt was a condition of the successful completion of her sex-offender treatment, and that successful completion of the program was a condition of probation, we conclude that the appellant was not given adequate notice of the conditions of her probation.

If an offender is put on notice that full compliance with mandatory sex-offender treatment requires an admission of guilt, such an admission then becomes, in our view, an objective measure of compliance, along with the criteria of attendance and

[3] The appellant has pointed our attention to a Hawaii appellate court decision that goes much further, reversing a trial court's revocation of probation for an appellant whose probation was "expressly and explicitly conditioned . . . upon his satisfactory participation in [a sex-offender treatment program], including admitting his sex crime(s)." State v. Reyes, 2 P.3d 725, 732 (Haw. Ct. App. 2000). The Hawaii court held that a "court cannot order [a defendant] to admit his sex crime(s)" when that defendant "did not personally and explicitly agree to admit his sex crime(s) and to accept probation on that basis." Id. at 733 (emphasis added). Unlike the Hawaii court, we decline to extend the notice requirement to require an explicit individual affirmation or acceptance of the admission criterion.

participation. Provided a defendant is made aware of this criterion by the trial court, obfuscation or denial of guilt in such cases could constitute a violation of her probation.

Conclusion

Because the appellant was not on notice that admitting guilt was a criterion for compliance with the treatment program, we reverse the trial court's order revoking probation.

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JERRY L. SMITH, JUDGE